

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 443, AFL-CIO
(DiChello Distributors, Inc.)

Case No. 34-CB-2723

and

RICHARD LAWSON, An Individual

Darryl Hale, Esq., for the General Counsel.
Norman Zolot, Esq., Woodbridge, Connecticut,
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Hartford, Connecticut on August 16, 2004. Richard Lawson filed the charge against the Respondent, International Brotherhood of Teamsters, Local 443 (the Union) on March 15, 2004. It was served by facsimile and regular mail on March 17. The Regional Director issued the Complaint in the matter on May 26, 2004.

The General Counsel alleges that Respondent violated Section 8(b)(1)(A) and 8(b)(2) by discriminating against the Charging Party, Richard Lawson, and causing the employer, DiChello Distributors, Inc., to discriminate by giving preference to one of the Union's stewards, James Papallo, in choosing his driving routes, despite Lawson's seniority. Respondent contends that it was entitled to do so because having first choice in routes materially enhances Papallo's ability to carry out his duties as union steward.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

DiChello Distributors, Inc. has its principal office and place of business in Orange, Connecticut, where it is engaged in the warehousing, sale and distribution of alcoholic beverages. DiChello purchases and receives goods at this facility from outside of Connecticut that are valued in excess of \$50,000. DiChello is thus an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, International Brotherhood of Teamsters, Local 443, which is party to a collective bargaining agreement with DiChello, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Charging Party, Richard Lawson, has worked for DiChello for 26 years, mostly, if not exclusively, driving a truck and delivering beer and related products to businesses in Connecticut. He was been a member of the Respondent Union throughout this period. Lawson's hiring date for seniority purposes is June 9, 1978. James Papallo, one of the Union's two stewards at DiChello, has a seniority computation date of June 18, 1978. George Burns, a warehouse employee, is also a union steward at DiChello's terminal (or barn).

DiChello divides its distribution routes into six zones. Every six months drivers bid in order of seniority on which zone they will cover and the route they will drive within these zones. When routes were bid for January-June 2003 and for July-December 2003, Lawson bid for the number one route in DiChello's zone 5, which includes Middletown, Connecticut, and Papallo bid for the number two route in zone 5. DiChello's dispatchers, who assemble the routes for each truck every night, try to make the number one route the easiest. In doing so, they try to assign the first truck large deliveries to warehouses and try to avoid assigning the first truck small deliveries, particularly those in which cases have to be carried up or down staircases. They also try to make the second truck's route easier than others driven by employees with less seniority within the zone.

A driver's choice of routes can also affect his or her compensation. Article XI of Respondent's collective bargaining agreement with DiChello (GC Exh. 2) sets forth a base pay figure and a commission paid according to the amount of product delivered and the number of bags of empty cans picked up by the driver.

Papallo served as an interim steward for approximately a year and a half, including periods during which his predecessor, Edward Barbarieri, underwent surgery and was off of work. At the end of December 2003, the Union's Business Representative, Daniel Flanagan, officially appointed Papallo as a steward, effective January 1, 2004. DiChello typed Papallo's name into the number one route slot in zone 5 on the bid sheet for January-June 2004.¹ Lawson objected and bid the second route in zone 5 under protest. Lawson filed an unfair labor practice charge objecting to the preference accorded to Papallo on March 15. For the period July-December 2004, Papallo bid the number 2 route and Lawson bid route number 1.

With regard to union stewards, Article IV of the Union's collective bargaining agreement with DiChello provides in section 3 that "It is understood and agreed that the stewards shall have super-seniority unless otherwise provided by law." Article X, Section 25, entitled Route Bidding, states, "It is understood employees shall have the right to select an area on the basis of seniority and may rebid no earlier than semi-annually."

DiChello's route drivers leave the terminal each day at different times, generally between 4:00 a.m. and 8:00 a.m., depending on the stops DiChello's dispatcher has scheduled for them during the previous night.² The driver of the number 1 truck in zone 5 is able, at least on some

¹ It is not clear whether DiChello initially typed Papallo's name into the first slot at the direction of the Union or without consulting the Union. However, when Lawson challenged the award of the number one truck to Papallo, DiChello's General Manager Pat Oates called Union Business Representative Daniel Flanagan. Flanagan told Oates that Papallo was entitled to exercise super-seniority to bid the number one truck (Tr. 54).

² Drivers distributing in zones 1 and 2 must leave the terminal no later than 7:00 a.m.; drivers in zones 2-6 must leave no later than 8:00 a.m. Drivers may leave as early as 3:00 a.m.,

Continued

occasions, to leave the terminal somewhat later than the driver of the number 2 truck and is able, on some occasions, to return somewhat earlier. However, I credit Richard Lawson's uncontradicted testimony that between January 1, 2004 and March 15, when he filed his charge, Papallo was rarely at the terminal when Lawson left the terminal in the number 2 truck or when he returned in the afternoon. I also credit Lawson's testimony that after he filed the charge, Papallo was almost always at the terminal when Lawson arrived in the morning and sometimes when he returned.

Analysis

The Board in *Dairylea Cooperative, Inc.*, 219 NLRB 656, 658 (1975) held that super seniority clauses in collective bargaining agreements which are not on their face limited to layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality. The rationale of this holding is that broad super seniority discriminates against employees, who in the exercise of their Section 7 rights, prefer to refrain from an active role in their union.

The Board sanctioned super seniority, which is restricted to layoff and recall, based upon a finding that it "furthers the effective administration of bargaining agreements...by encouraging the continued presence of the steward on the job." Thus, the Board also concluded that such super seniority redounds to the benefit of all unit employees.

It is clear that a union must do more than merely assert that super seniority will further effective representation by the steward to rebut the presumption of illegality. However, Board law is far from clear as to how much a union must show. In *International Union, UAW, Local 331*, 228 NLRB 1446 (1977), the Board held that in order to rebut the presumption of illegality, a union need not show that super seniority is *necessary* to the performance of the duties of a steward or committeeman, but merely desirable for the carrying out of their duties. In *Consolidated Freightways*, 302 NLRB 984 (1991) and *Goodyear Tire & Rubber Co.*, 322 NLRB 1007 (1997), the Board appeared to require minimal justification to satisfy the union's burden of proof.

Other decisions appear to require a much more convincing justification for super seniority. For example, in *Mechanics Educational Society Local 56 (Revere Cooper)*, 287 NLRB 935, 936-37 (1987) and *Joy Technologies*, 306 NLRB 1 (1992) *enfd.* 990 F.2d 104 (3d Cir. 1993), the Board held that only the minimal exercise of protection was lawful to protect a union steward. In those cases, the Board held that while the union could invoke super seniority in order to allow a steward to keep *a job* in which he could perform his duties, it was not necessarily entitled to invoke super seniority to allow the steward keep *his* job.

Applying the *Dairylea* principle to the instant case, I find that the Union violated Section 8(b)(1)(b)(A) and 8(b)(2) in invoking super seniority to obtain the number one truck route in zone 5 for union steward James Papallo to the detriment of the Charging Party. I read *Dairylea* to require a showing that invoking super seniority will further effective administration of bargaining agreements in a *material and substantial* manner. The record evidence establishes that Papallo was able to adequately perform his duties as steward as the driver of truck number 2, even assuming that he could perform his duties somewhat better, or more easily, if he was assigned to truck number one.

depending on the demands of their route.

Lawson's uncontradicted testimony establishes that Papallo was able to perform his duties between January 1 and March 15, 2004, without arriving at the terminal before Lawson or returning earlier. Moreover, as interim steward for a year and a half prior to January 1, 2004, Papallo was able to perform the steward's duties, while driving the number 2 truck, on occasions when Steward Edward Barbarieri was off of work.³

Finally, this record indicates that assigning the number one truck to Papallo furthers Papallo's ability to carry out his duties as steward only minimally, if at all. Employees who need to contact Papallo may communicate with him by phone if he is driving the number 2 truck. Papallo testified that when he receives a complaint from a driver in the afternoon, he generally waits until the next morning to discuss it with DiChello's Operations Director, Patrick Oates.

The fact that George Burns, another union steward at the terminal, handles drivers' grievances in Papallo's absence, also establishes that driving the number two truck does not materially enhance Papallo's ability to perform his duties.⁴ Indeed, this fact distinguishes the instant case from *Consolidated Freightways*, 302 NLRB 984, in which only the steward who benefited from super seniority, was available to handle grievances for unit members. Finally, the fact that Papallo may have to come in earlier or stay later to perform certain duties, such as reviewing the computer printout of drivers' stops and attending safety meetings, does not warrant infringement of Richard Lawson's Section 7 rights.⁵

Conclusions of Law

Respondent, the International Brotherhood of Teamsters, Local 443, violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act by invoking the super seniority provisions of its collective bargaining agreement to require the employer, DiChello Distributors, Inc., to give its steward, James Papallo, priority over Richard Lawson, an employee with greater seniority, in the selection of driver's routes.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

³ As the General Counsel points out in its brief, Barbarieri was apparently able to perform his steward's duties while driving a route in zone 1, which necessitated his leaving DiChello's terminal no later than 7:00 a.m.

⁴ Prior to his retirement at the end of 2003, Ed Barbarieri performed his duties, at times, as Respondent's drivers' steward while working in DiChello's warehouse on light duty.

⁵ Papallo testified that each morning he reviews the employer's daily roster, and if he sees a problem, he takes it up with Pat Oates, DiChello's Operations Director (Tr. 89-91). Oates' testimony at Tr. 55 suggests that their contact is much more limited—essentially to situations in which a driver brings a complaint to Papallo. Oates' testimony also indicates that he is able to schedule safety meetings in such a manner to accommodate Papallo's work schedule, Tr. 57. I find that Papallo's activities in reviewing the daily roster and attending safety meetings, do not, even in conjunction with his other duties as steward, rebut the presumption of illegality with regard to super-seniority in the selection of routes.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, International Brotherhood of Teamsters, Local 443, New Haven, Connecticut, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Invoking the super seniority clause of its collective bargaining agreement with DiChello Distributors, Inc. to accord its stewards priority in the assignment of driving routes, or any other benefit conferred on the basis of super seniority that is not required to further the effective administration of the collective bargaining agreement in a material and substantial manner;

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify DiChello Distributors, Inc., in writing that, in accordance with the collective bargaining agreement, driving routes within its zones should be bid strictly on the basis of seniority, — without exception;

(b) Make Richard Lawson whole for any loss of earnings that he may have suffered as a result of being denied the opportunity to bid on route 1, zone 5 for the period of January 1 – June 30, 2004.

(c) Within 14 days after service by the Region, post copies of the attached Notice marked "Appendix."⁷ Copies of the Notice, on forms provided by the Regional Director for Region 34 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where DiChello Distributors, Inc., Orange, Connecticut, allows the posting of notices by the Respondent for employees who are represented by the Respondent. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent or DiChello Distributors has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by DiChello, who were represented by Respondent, at any time since January 1, 2004.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C., September 28, 2004.

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Arthur J. Amchan
Administrative Law Judge

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APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT invoke the super seniority provisions of our collective bargaining contract with DiChello Distributors, Inc. to accord union stewards priority in the bidding for driving routes, or in any other manner that is not necessary to further the effective administration of the collective bargaining agreement in a material and substantial manner.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify DiChello Distributors that driving routes shall be bid pursuant to the collective bargaining agreement, in accordance with the drivers' seniority, without exception.

WE WILL make Richard Lawson whole for any loss of earnings he may have suffered as the result of being prohibited from bidding on route 1, zone 5 for the period January 1-June 30, 2004.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 443, AFL-CIO

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

280 Trumbull Street, 21st Floor, Hartford, CT 06103-3503

(860) 240-3522, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (860) 240-3528.